HAIRUDDIN NARZER

v.

TIMBALAN MENTERI DALAM NEGERI KEMENTERIAN DALAM NEGERI MALAYSIA & ORS

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CRIMINAL APPLICATION NO: 44-7-2001]
31 JANUARY 2002

CRIMINAL PROCEDURE: *Habeas corpus - Detention of drug addict - Detention order by magistrate - Whether notes of proceedings recorded by magistrate established such an order - Whether order legally sustainable*

CRIMINAL PROCEDURE: *Habeas corpus - Valid ground for - Extension of applicant's bail - Allegation that applicant's urine test not ready - Allegation that report of National Drug Agency not ready - Whether true as reflected in documentary evidence - Whether magistrate correct in extending applicant's bail*

CRIMINAL PROCEDURE: *Habeas corpus - Principles governing - Technical defects in detention order - Right of applicant to avail himself of any technical defects - Whether order was carried out in strict and meticulous compliance with art. 5(1) Federal Constitution*

In this application for a writ of *habeas corpus* against the respondents, the detainee/applicant raised the following main issues: (i) that both the order and the rehabilitation officer's report dated 2 August 2001 were defective and void; and (ii) on the extension of the applicant's bail from 26 June 2001 to 5 July 2001 and between 26 July 2001 to 2 August 2001.

Held:

[1] The order that was being challenged by the applicant herein referred to a detention order that was purportedly made by the learned magistrate. However, the notes of proceedings recorded by the magistrate had failed to establish that there was indeed such an order dated 2 August 2001. Instead, the said notes showed that the order was made on 1 August 2001. (pp 475 f-g, i & 476 a)

[1a] Even though the sealed copy of the order which was eventually signed under the hand of the magistrate expressly stated that the order was on 2 August 2001; on which date there was no inquiry; it (the sealed copy) could not be said to be an order which was legally sustainable. Hence,

the detention order for the purpose of the applicant's rehabilitation order was unlawful under this ground. (p 475 f-g)

[2] The notes of proceedings recorded by the magistrate on 26 June 2001 to the effect that the bail for the applicant was extended from 26 June 2001 to 5 July 2001 on the ground that the urine test was not ready, did not reflect the true position as the applicant's urine sample was taken on 22 June 2001 as found in the documentary evidence. Hence, this ground relied on by the respondents could not be sustained. (p 476 c-d)

[3] The extension of the applicant's bail from 26 July 2001 to 2 August 2001 was granted on the ground that the report of the National Drug Agency was not ready, as was stated by the magistrate. However, the documentary evidence showed that this report had already been completed and sent to the magistrate on 10 July 2001, ie 16 days before the said extension of the applicant's bail. Thus, it was not correct to detain the applicant under this ground. (p 476 e)

[4] A person who is detained for rehabilitation under the Drug Dependants (Treatment and Rehabilitation) Act 1983 is deprived of his personal liberty and such deprivation could only be upheld if it was carried out in accordance with the law, ie art. 5(1) of the Federal Constitution. In this connection, the applicant was entitled to avail himself of any technical defects which could have invalidated the order resulting in the deprivation of his liberty. (p. 476 g-h)

[Application allowed.]

Case(s) referred to:

Ng Chai Yang v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1994] 2 MLJ 336 ***(refd)***

Re Datuk James Wong Kim Min [1976] 2 MLJ 245 ***(refd)***

Legislation referred to:

Drug Dependants (Treatment and Rehabilitation) (Forms) Rules 1998, s. 6(1), Form 2

Federal Constitution, art. 5(1)

For the applicant - Richard Bong Chong Fook; M/s Bong & Co
For the respondents - Mohd Abazafree Mohd Abbas FC

Reported by Raja Vishnu Sivarajah

JUDGMENT

Low Hop Bing J:

Application

This is the application by the detainee for a writ of *habeas corpus* against the respondents *viz*. the deputy home minister, the Inspector General of Police and the Chief Commandant of the Karak Rehabilitation Centre.

Case For Applicant

Richard Bong Chong Fook, learned counsel for the applicant, submitted as follows:

(a) both the order and the rehabilitation officer's report dated 2 August 2001 are defective and void, on the ground that there was no inquiry on 2 August 2001. The inquiry was instead held on 1 August 2001;

(b) the extension of the applicant's bail from 26 June 2001 to 5 July 2001 on the ground that the applicant's urine test was not completed cannot be sustained when the said test was in fact completed on 22 June 2001;

(c) the extension of the applicant's bail from 26 July 2001 to 2 August 2001 on the ground that the ADK (ie, Agensi Dadah Kebangsaan) report or the National Drugs Agency's report was not ready is not correct, as the said report was indeed ready on 10 July 2001;

(d) the applicant was not sent to hospital for medical examination in order to determine if the applicant was a drug dependant within the meaning of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ("the Act"); and

(e) Cannabinoid is not a drug as defined in the first schedule to the Dangerous Drugs Act 1952.

By reason of the aforesaid, the applicant prays for the issue of a writ of *habeas corpus*.

Contention For Respondents

Mohd Abazafree Mohd Abbas, learned Federal Counsel for the respondents, submitted that the intention of the Act was rehabilitative and not preventive and that the detention of the applicant has satisfied two conditions *viz*. that the applicant is a drug dependant and that there is opportunity for the applicant to make representation.

It was conceded that the proceeding before the learned magistrate was on 1 August 2001 and there was an error on the part of the learned magistrate who wrote the date as 2 August 2001, which error in his view is not

fundamental. He contended that s. 6 of the Act has been complied with by the learned magistrate.

He argued that although the urine test is not mandatory, the doctor's report is.

The respondents contended that while cannabinoid is not listed in the Dangerous Drugs Act 1952, morphine is expressly listed in the first schedule to the Dangerous Drugs Act 1952.

His view is that the failure of the doctor to fill in the form indicating the physical marks is not fatal.

Decision Of The Court

I shall deal with the issues pertaining to the medical report and cannabinoid and morphine raised for the applicant. In my considered opinion, the submission presented for the applicant in relation to the medical report prepared by one Dr. Mohd Zaki Abd Hamid cannot be upheld as there is undoubtedly sufficient compliance with s. 6(1) of the Act and Form 2 of the Drug Dependants (Treatment and Rehabilitation) (Forms) Rules 1998 P.U.(A) 310/98 made thereunder. Hence, this ground relied on by the applicant cannot succeed.

The issue relating to the non-listing of cannabinoid in the first schedule to the Dangerous Drugs Act 1952 is a non-issue as the applicant's urine sample was tested and proved to have contained morphine which is one of the dangerous drugs listed in Part III of the First Schedule to the Dangerous Drugs Act 1952. Again, there is no merit in the issue.

The other three grounds appear to demonstrate some substance. A proper perusal of the notes of proceedings recorded by the learned magistrate which resulted in the order for rehabilitation shows that the said order was made by the learned magistrate on 1 August 2001, but the sealed copy of the order which was eventually signed under the hand of the learned magistrate expressly stated that the order was "Diberi di bawah tandatangan saya di meterai Mahkamah di Jerantut" (ie, "Given under my hand and seal of the court in Jerantut") on 2 August 2001, on which date there was no inquiry. Further, the report of the rehabilitation officer refers to the subject in question ie, the applicant who was purportedly brought to the court on 2 August 2001. It is therefore apparent that there is a missing link in that there was no order made by the learned magistrate on 2 August 2001, in which event the signed and sealed copy of the order under the hand of the learned magistrate did not reflect the true position. The order that is being challenged by the applicant herein refers to a detention order that was purportedly made by the learned magistrate. However, the record of proceedings has failed to establish that there

was indeed such an order dated 2 August 2001. Therefore, the signed and sealed copy of the order under the hand of the learned magistrate on 2 August 2001 cannot be said to be an order which is legally sustainable.

The mistake of the learned magistrate as conceded by the learned federal counsel cannot be so construed in favour of the respondents, especially in the matter of the deprivation of an individual's personal liberty. Even assuming for a moment that there is such a mistake, it must be liberally construed in such a manner as to benefit the detainee. No detention order can ever be upheld on the ground of a mistake.

The notes of proceedings recorded by the learned magistrate on 26 June 2001 to the effect that the bail for the applicant was extended from 26 June 2001 to 5 July 2001 on the ground that the urine test was not ready did not reflect the true position as the applicant's urine sample was taken on 22 June 2001 as evidenced in the laporan makmal (labaratory report) in exh. A-5, encl. (2), dated 22 June 2001 which contained an endorsement that the applicant's urine contained "MORFIN/CANNABINOID".

The extension of the applicant's bail from 26 July 2001 to 2 August 2001, as was clearly stated by the learned magistrate, was granted on the ground that the report of the National Drug Agency (Agensi Dadah Kebangsaan, ADK) was not ready. However, exh. A6 in encl. (2) showed that this report and recommendation of the rehabilitation officer, attached to National Drug Agency, had already been completed and sent to the learned magistrate on 10 July 2001 ie, 16 days before the said extension of the applicant's bail.

In the light of the foregoing three grounds, especially the absence of an order on 2 August 2001, it is my considered view that the detention order for the purpose of the applicant's rehabilitation is unlawful and therefore the order purportedly made by the learned magistrate on 2 August 2001 when there was no such order is invalid, null and void and of no legal force.

A person such as the applicant who is detained for rehabilitation under the Act is deprived of his personal liberty and such deprivation could only be upheld if it is carried out in accordance with the law: Article 5(1) of the Federal Constitution. In this connection, the applicant is entitled to avail himself of any technical defects which may invalidate the order resulting in the deprivation of his liberty: *Ng Chai Yang v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1994] 2 MLJ 336 HC.

Strict and meticulous compliance with the law is the cornerstone providing the firm foundation in order to sustain an order depriving an individual's personal liberty. This has been authoritatively stated by the Federal Court through the judgment of Lee Hun Hoe, CJ (Borneo) (as he then was) in

Re Datuk James Wong Kim Min [1976] 2 MLJ 245, 251 in the following words:

> In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an applicant in applying for a writ of *habeas corpus* is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty.

This was also followed by Malik Ishak, JC (now J) in *Ng Chai Yang, supra*.

In the circumstances, on the foregoing grounds I allow this application in encl. (2) and order that the applicant be released forthwith and this decision by consent of the respective learned counsel shall bind the parties in case No. 44-9-2001.